ARAB-MALAYSIAN MERCHANT BANK BHD

v.

SILVER CONCEPT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NO: D4-22A-145A-2003]
18 JULY 2008

BANKING: *Loan - Loan facility - Al Bai Bithaman Ajil - Default in repayment - Whether plaintiff had the right to cancel facility upon default - Whether agreed profit re-earned by plaintiff - Whether Al Bai facility agreement an established syariah compliant facility - Whether defendant estopped from denying liability*

A sale and purchase agreement was entered into between the defendant and Ng Eng Hiam Plantations Sdn Bhd ('seller') for the sale and purchase of 2,075 acres and 24.52 poles of land in the District of Ulu Selangor, State of Selangor, known as Rasa Estate ('the land') and other assets. To part finance the acquisition of the land and other assets ('project property') the defendant requested a consortium of financial institutions with the plaintiff as the arranger and agent; comprising of Perwira Affin Bank Bhd, Bank Islam Malaysia Berhad, Mayban Finance Bhd and Kewangan Industri Berhad ('vendors') for an ABBA facility with a sale price of RM216,875,000 in aggregate made up of a purchase price of RM125,000,000 and a profit element. In connection with the above, the defendant, the plaintiff as agent and Ng Eng Plantations Sdn Bhd entered into a sale and purchase novation agreement ('the novation agreement') whereby certain rights and obligations between Ng Eng Hiam Plantations Sdn Bhd and the defendant under the said sale and purchase agreement were novated from the defendant to the vendors or as the case may be, to the plaintiff on behalf of the vendors . The plaintiff, as agent and arranger, the defendant and vendors entered into an instalment sale agreement ('the instalment sale agreement') whereby the defendant agreed to the conditions as set out therein, to purchase from the vendors whatever right, title or interest they had thereto ('the title') in the project property immediately after the sale and transfer of the project property by Ng Eng Hiam Plantations Sdn Bhd to the vendors pursuant to the provisions of the novation agreement. The instalment sale agreement purported to be the Al Bai' Bithaman Ajil Facility. The defendant defaulted

in the instalment payment due on the instalment payment date, thereby precipitating a default pursuant to the instalment sale agreement; the novation agreement and the remaining transaction documents (as defined in the instalment sale agreement). The plaintiff as agent for the vendors informed the defendant to pay the instalment in default of which, *inter alia*, the payment of the unpaid sale price would be accelerated pursuant to the default provisions in the instalment sale agreement. The defendant, however, denied liability.

Held (judgment for the plaintiff):

(1) The mechanism of the Al Bai' Bithaman Ajil or 'deferred instalment sale' employed three separate agreements. In the first, the bank bought the property from the customer. In the second, the bank resold to the customer. In the third, the customer charged the property to the bank. The agreements were not separate standalone agreements, but were related as they were part of a single transaction, and must be read together. Under the terms of the sale and purchase novation agreement and instalment sale agreement, the plaintiff had the right to cancel the ABBA facility upon default, thereby canceling the contract. (para 11)

(2) The property was purchased on 15 June 1995. The defendant had sought financing and the ABBA facility was offered. The plaintiff had executed the novation agreement on 29 March 1996 and the sum paid was RM125,000,000. The plaintiff also entered into the instalment sale agreement on 29 March 1996. It was sold under the Al Bai' Bithaman Ajil Facility with a sale price of RM216,875,000. The profit element on the same day was RM91,875,000. The profit was justified on the basis it was to be paid by instalments of RM3,281,250 on the dates specified and a final instalment payment of RM128,281,250. Default was declared as having occurred on 22 January 1998 *ie* twenty two months later. The sum sought was RM185,536,908.64. The date of payment was well past due. The agreed profit for the time period agreed to had already been exhausted and there could be no question that any of the agreed profit had not been re-earned by the plaintiff. (para 15)

(3) The defendant had submitted that the Al Bai Facility Agreement was illegal, null and void as it was a scheme to defraud the public and the public authority in that although the loan agreement was couched and disguised as a sale transaction, in fact the Al Bai Facility Agreement was a loan transaction with a fixed interest charged for the loan granted by the lenders to the defendant. However, the defendant was under no compulsion to agree or sign. Hence, it was not for the defendant now to say it was a loan with interest to seek to avoid paying back. The ABBA facility was an established syariah compliant facility. It was a syariah form of financing conducted in the form of a sale with payment by instalment. There was a gulf of difference between the legal consequences of a sale and a loan. (paras 16 & 17)

(4) The defendant had made some payments but then defaulted. The defendant had then sought to restructure but did not follow through. The defendant had also made a payment after default was called. The defendant was estopped from denying liability. To date, well after the date of final instalment payment date, there was no evidence put before the court that payment had been made. Hence, the court entered judgment as to the ABBA facility: (i) that the defendant pay the plaintiff the sum of RM185,536,908.64; (ii) that the defendant indemnify the plaintiff against all liabilities and losses suffered by the plaintiff and/or the vendors as a result of the default of the defendant in the punctual payment of all amounts due under the instalment sale agreement and (iii) that the defendant pay costs including costs on a solicitor and client basis. (paras 17 & 19)

Case(s) referred to:
Affin Bank Bhd v. Zulkifli Abdullah [2006] 1 CLJ 438 HC ***(refd)***
Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Berhad [1995] 3 CLJ 690 CA ***(refd)***

Legislation referred to:
Central Bank of Malaysia Act 1958, s. 16B

For the plaintiff - M/s Rozali Ismail & Co
For the defendant - M/s VK Lingam & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Abdul Wahab Patail J:

[1] By a sale and purchase agreement dated 15 June 1995 (the said sale and purchase agreement) between the defendant and Ng Eng Hiam Plantations Sdn. Bhd. ("seller") for the sale and purchase of 2,075 acres 1 rood and 24.52 poles of land in the District of Ulu Selangor, State of Selangor, known as Rasa Estate ("the land") and other assets.

C **Al-Bai' Bithaman Ajil Facility (ABBA Facility)**

[2] To part finance the acquisition of the land and other assets ("project property"), the defendant requested a consortium of financial institutions with the plaintiff as the arranger and agent; D comprising of Perwira Affin Bank Bhd, Bank Islam Malaysia Berhad, Mayban Finance Bhd and Kewangan Industri Berhad ("vendors") for an ABBA Facility with a sale price of RM216,875,000 in aggregate made up of a purchase price of RM125,000,000 and a profit element.

E **[3]** In connection with the above, the defendant, the plaintiff as agent and Ng Eng Plantations Sdn. Bhd. entered into a Sale and Purchase Novation Agreement dated 29 March 1996 ("the Novation Agreement") whereby certain rights and obligations F between Ng Eng Hiam Plantations Sdn. Bhd. and the defendant under the said sale and purchase agreement were novated from the defendant to the vendors or as the case may be, to the plaintiff on behalf of the vendors. The plaintiff as agent and arranger, the defendant and vendors entered into an instalment G sale agreement dated 29 March 1996 ("the Instalment Sale Agreement") whereby the defendant agreed to the conditions set out therein, to purchase from the vendors whatever right, title or interest they had thereto ("the title") in the project property immediately after the sale and transfer of the project property by H Ng Eng Hiam Plantations Sdn. Bhd. to the vendors pursuant to the provisions of the Novation Agreement. The Instalment Sale Agreement purports to be the Al-Bai' Bithaman Ajil Facility. It was agreed the payment be made by instalments of RM3,281,250 on each date as defined as the Instalment Payment Date in the I Instalment Sale Agreement.

[4] The defendant defaulted in the instalment payment due on the Instalment Payment Date ie, on 22 January 1998; thereby precipitating a default pursuant to the Instalment Sale Agreement; the Novation Agreement and the remaining Transaction Documents (as defined in the Instalment Sale Agreement). The plaintiff as agent for the vendors, informed the defendant by a letter dated 26 February 1998 to pay the instalment due on 22 January 1998 in default of which, *inter alia*, the payment of the unpaid sale price would be accelerated pursuant to the default provisions in the Instalment Sale Agreement. The defendant failed to pay the instalment due for payment on 22 January 1998.

[5] On the instructions of the Instructing Group (as defined in the Instalment Sale Agreement) by a letter dated 10 March 1998, the plaintiff recalled the entire unpaid sale price in respect of the ABBA Facility and cancelled the Total Purchase Price Commitment pursuant to the provisions of the Instalment Sale Agreement.

[6] The defendant by a letter dated 30 June 1998 appealed to the plaintiff to restructure the facilities. The plaintiff and the other co-lenders agreed to meet with the defendant on 10 July 1998. The defendant by its letter dated 16 July 1998 thanked the plaintiff and the co-lenders for agreeing to discuss to solve the defendant's dilemma. The defendant's letter to the plaintiff dated 6 August 1998 and the plaintiff's letter to the defendant dated 7 October 1998 show that the plaintiff had requested from the defendant for further information for consideration, and the plaintiff had informed the defendant to "revert" to the plaintiff on or before 9 October 1998. The defendant failed to do so.

[7] The defendant had sought a rebate.

[8] The plaintiff's solicitors submitted that the defendant is not entitled to any rebate under the Instalment Sale Agreement if, at all, any rebate is at the plaintiff's sole discretion. That is a correct statement with regard to *ibra* (also known previously as *muqassah*). In my view, the fact that it is purely discretionary however makes it all the more necessary to determine what precisely was agreed to under the ABBA Facility.

[9] The defendant denied liability.

[10] The plaintiff maintained that the defendant is estopped from denying liability with regard to the ABBA Facility as payment was made by the defendant on 28 March 2001 in the sum of RM12,027,563. I accept that the defendant is estopped from denying liability, but the payment of that amount is not necessarily a statement of admission of the quantum that is due.

[11] The mechanism of the Al-Bai' Bithaman Ajil or 'deferred instalment sale' employs three separate agreements. In the first, the bank bought the property from the customer. In the second, the bank resold to the customer. In the third, the customer charged the property to the bank, allowing the bank to sell on default. The agreements are not separate standalone agreements, but are related as they are part of a single transaction, and must be read together. Under the terms of the Sale and Purchase Novation Agreement and Instalment Sale Agreement, the Plaintiff had the right to cancel the ABBA Facility upon default, thereby cancelling the contract.

[12] It was submitted for the plaintiff that the Syariah Advisory Council had determined that the Al-Bai' Bithaman Ajil complied with the *syariah* and once the determination is made on the issue of *syariah* compliance by the said Syariah Advisory Council any question on their said determination can be referred to the Syariah Advisory Council. Section 16B of the Central Bank of Malaysia Act 1958 (Act 519) however does not make reference mandatory. It clearly did not intend the Syariah Advisory Council in the executive branch of government to be the judicial authority. Thus, its rulings are binding only upon the arbitrator where reference is made by an arbitrator. In the case of reference by the court, the ruling is not binding but shall be taken into consideration. Given that reference is discretionary and the rulings are not binding, and taking into consideration the issue is not as to the *syariah* compliance of the ABBA Facility but the interpretation of its terms, the court is of the opinion reference is not necessary.

[13] It was submitted for the plaintiff that the defendant had agreed and covenanted with the plaintiff that the certificate as to the amount payable to the plaintiff is conclusive of the amount to be paid by the defendant. According to the certificate the amount payable is sum of RM185,536,908.64.

[14] Indebtedness may be ascertained conclusively by a certificate of indebtedness where the parties have dearly agreed that it may be so ascertained. It is now settled that, notwithstanding agreement that a certificate of indebtedness shall be conclusive proof of indebtedness, a defendant is not prevented from adducing evidence showing a manifest error. This is distinguishable from a defendant applying for further and better particulars to enable him to show if there is manifest error, which would clearly emasculate the force of the conclusive certificate of indebtedness clause. See *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Berhad* [1995] 3 CLJ 690 CA.

[15] In this case, the evidence before the court is that the property was purchased on 15 June 1995. The defendant sought financing. The ABBA Facility was offered. The plaintiff executed the Novation Agreement on 29 March 1996. The sum paid was RM125,000,000. The plaintiff also entered into the Instalment Sale Agreement, a component of the ABBA Facility on 29 March 1996. It was sold under the Al-Bai' Bithaman Ajil Facility with a sale price of RM216,875,000. The profit element on the same day was RM91,875,000. The profit was justified on the basis it was to be paid by instalments of RM3,281,250 on the dates specified and a final instalment payment of RM128,281,250. Default was declared as having occurred on 22 January 1998, ie, 22 months later. The sum sought is RM185,536,908.64. While a question as to what is the amount due might arise in the event of an early termination, it is plain in this case that the date of payment is well past due. That means the agreed profit for the time period agreed to had already been exhausted and there can be no question that any of the agreed profit had not been re-earned by the plaintiff.

[16] The defendant submitted the Al-Bai' Facility Agreement is illegal, null and void as it is a scheme to defraud the public and the public authority in that although the loan agreement is couched and disguised as a sale transaction, in fact the Al-Bai' Facility Agreement is a loan transaction with a fixed interest charged for the loan granted by the lenders to the defendant.

[17] The submission for the defendant stopped short of asserting that the plaintiff came shopping for a customer and made proposals to the defendant out of the blue. It was the defendant who sought financing. The ABBA Facility was offered. It was accepted by the defendant. The defendant signed the Novation

Agreement so that the plaintiff was the legal purchaser. It then on the same day bought from the plaintiff under the Instalment Sale Agreement, giving the plaintiff a profit. It was under no compulsion to agree or sign. It is not for the defendant now to say it was a loan with interest to seek to avoid paying back. The ABBA Facility is an established *syariah* compliant facility. It is a *syariah* form of financing conducted in the form of a sale with payment by instalment. There is a gulf of difference between the legal consequences of a sale and a loan. But having to pay is always having to pay. The defendant made some payments. The defendant defaulted. The defendant sought to restructure but did not follow through. The defendant made a payment after default was called. The defendant is estopped from denying liability. The only issue if at all, is the issue of quantum. It applies however if payment had been made. But to date, well after the date of final instalment payment date, there is no evidence put before the court that payment had been made.

[18] Since there was a novation agreement then for the reasons set out in D4-22A-67-2003 *Arab-Malaysian Finance Berhad v. Taman Ihsan Jaya Sdn Bhd & 2 Ors & Koperasi Seri Kota Bukit Cheraka Berhad (Third Party) and Other Cases* the interpretation of selling price in *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438 is to be applied.

[19] And the court enters judgment as to ABBA Facility:

i. That the defendant pays the plaintiff the sum of RM185,536,908.64;

ii. That the defendant indemnifies the plaintiff against all liabilities and losses suffered by the plaintiff and/or the vendors as a result of the default of the defendant in the punctual payment of all amounts due under the Instalment Sale Agreement; and

iii. That the defendant pays cost including costs on a solicitor and client basis.